Nos. 12070-12071

In the United States Court of Appeals for the Ninth Circuit

MYRON L. GLENN, ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION, DEFENDANT-APPELLEE

RAYMOND F. DRAKE, ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

WILLIAM S. TYSON,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
WILLIAM A. LOWE,
HARRY A. TUELL,
Attorneys,
United States Department of Labor, Washington, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

FILED
SEP 23 1949
PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Jurisdiction	2
Statement of the case	2
Questions presented	4
Summary of argument	4
Argument:	
I. The summary dismissal on jurisdictional grounds was error	5
II. The summary judgment of dismissal cannot be sustained on any of the other grounds advanced by appellee	12
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Aaron Ferer & Sons v. *Richfield Oil Corp.*, 150 F. (2d) 12	10
Doehler Metal Furniture Co. v. *United States*, 149 F. (2d) 130	11
Frank v. *Wilson & Co., Inc.*, 172 F. (2d) 712, certiorari denied, 337 U. S. 918	7, 8
Green v. *Cherokee Motor Coach Co.*, 8 W. H. Cases 277	9
Johnson v. *Dierks Lumber & Coal Co.*, 130 F. (2d) 115	8
Joshua Hendy Corp. v. *Mills*, 169 F. (2d) 898	5, 6, 7, 8
Kennedy v. *Silas Mason Co.*, 334 U. S. 249	10, 12
Land v. *Dollar*, 330 U. S. 731	11
Lane Bryant Inc. v. *Maternity Lane*, 173 F. (2d) 559	10
Lewellen v. *Hardy-Burlingham Min. Co.*, 73 F. Supp. 63	8
McComb v. *Johnson*, 174 F. (2d) 833	11
Michigan Window Cleaning Co. v. *Martino*, 173 F. (2d) 466	9
Musteen v. *Johnson*, 133 F. (2d) 106	11
Overnight Motor Co. v. *Missel*, 316 U. S. 572	8
Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620	11
Stratton v. *Farmers Produce Co.*, 134 F. (2d) 825	11
Tipton v. *Bearl Sprott Co.*, 175 F. (2d) 432	5, 6
Toebelman v. *Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016	13
Twigg v. *Yale & Towne Mfg. Co.*, 7 F. R. D. 488	11
Walling v. *Fairmont Creamery Co.*, 139 F. (2d) 318	11, 12
Walling v. *Reid*, 139 F. (2d) 323	11
Wittlin v. *Giacalone*, 154 F. (2d) 20	13
Federal Statutes:	
Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):	
Sec. 16 (b)	2
Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C., Sec. 251 et seq.):	
Sec. 2	1, 2, 3, 4, 5, 6, 7, 8, 9, 11
Sec. 9	3, 12
Sec. 11	3, 12
28 U. S. C. 1291, 1294 (1)	2
28 U. S. C. 1331	2
Miscellaneous:	
93 Cong. Rec. 5281	9
29 C. F. R., Part 790, Sec. 790.9 (b); 12 F. R. 7655	9

In the United States Court of Appeals for the Ninth Circuit

No. 12070

MYRON L. GLENN ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION, DEFENDANT-APPELLEE

No. 12071

RAYMOND F. DRAKE ET AL., PLAINTIFFS-APPELLANTS

v.

SOUTHERN CALIFORNIA EDISON COMPANY, LTD., A CORPORATION, DEFENDANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

These are appeals from final judgments (G. R. 331–333, D. R. 103–105) [1] of the District Court of the United States for the Southern District of California, Central Division, dismissing the actions for lack of jurisdiction of the subject matter by reason of Section 2 of the Portal-to-Portal Act of 1947 (c. 52, 61 Stat. 84, 29 U. S. C. Sec. 251 et seq.), hereinafter referred to as

[1] The record in the *Glenn* case will be referred to by the initials G. R., that in the *Drake* case by the initials D. R.

the "Portal Act." The actions were brought by appellants under Section 16 (b) of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201 et seq.), hereinafter referred to as "the Act," to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and attorneys' fees. The cases were consolidated for trial below by court order (D. R. 14) and on appeal by stipulation (G. R. 336) by reason of the substantial similarity of both the factual and legal issues involved. The actions were summarily dismissed on jurisdictional grounds, without a trial on the merits. Because they present significant questions of interpretation and procedure which are of importance in the administration and enforcement of the Act, the Administrator of the Wage and Hour Division, United States Department of Labor, with leave of Court, submits this brief as *amicus curiae*.

JURISDICTION

The district court had jurisdiction of these cases under Section 16 (b) of the Act, and also under what is now Title 28, United States Code, Section 1331. The effect upon that jurisdiction of Section 2 of the Portal Act [2] is the principal legal issue in these appeals. The jurisdiction of this Court over the appeals arises under Title 28, United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

While the facts, particularly those of an evidentiary character, are discussed at length in the briefs of both appellants and appellee, and require no further repetition here, it is believed that a somewhat different presentation of the course which the actions have taken to date may be of assistance in better understanding the procedural and jurisdictional questions with which this brief will be concerned.

These actions were started prior to the passage of the Portal Act, and relate solely to the recovery of overtime compensation claimed to be due for work performed prior to May 14, 1947.

[2] Section 2 of the Portal Act is set forth in full in the Appendix, *infra*, pp. 14–15.

In order to meet the specific jurisdictional requirements for such actions, which Section 2 of the Portal Act provides, it became necessary to file amended complaints. The most recent of the amended complaints in both cases (G. R. 103–111, D. R. 37–42), in the light of appellee's answers (G. R. 131–172, D. R. 46–75), raise disputed questions as to coverage under the Act, the number of hours which may properly be regarded as hours worked under it, whether appellants worked any overtime for which appellee failed to pay in accordance with the Act's requirements, the compensability under an express provision of a written or nonwritten contract, or a custom or practice, of appellants' activities during overtime hours, the existence of good faith defenses under Sections 9 and 11 of the Portal Act, and the constitutionality of the Portal Act.

Numerous answers to interrogatories, responses to requests for admissions, exhibits, depositions, affidavits, and stipulations have been filed by both sides. There has also been some oral testimony during pretrial proceedings (D. R. 116–176). A stipulation (G. R. 75–84) filed pursuant to the order for pretrial hearing sets forth the contentions of both sides on the various issues involved and indicates disputes as to both legal and factual issues. Appellants moved for a partial summary judgment (G. R. 112) which would leave only the amount of damages to be determined by a Special Master. The affidavits filed in support of (G. R. 113–123) and in opposition to (G. R. 173–216) this motion show sharply conflicting versions as to the contract of employment, the understanding of the parties as to what appellants' salaries covered, the hours devoted by appellants to the different types of activities in which they engaged, whether appellee paid the required overtime, and appellee's good-faith defenses. Appellee also filed a motion for summary judgment (G. R. 219–220) based upon the entire record in the proceedings, and again there were both supporting (G. R. 222–256) and opposing (G. R. 298–311) affidavits offering the same sharply conflicting positions.

An order was entered on both motions for summary judgment (G. R. 329–331) in which it was recited that there was no genuine issue as to "any material fact involved in determining the right to recovery," that the activities in question were not

made compensable "by any contract or custom or practice" during the portion of the day they were engaged in, that if those noncompensable activities were excluded in computing overtime, the requirements of the Act were fully met, that since these actions sought to enforce liability for such noncompensable activities, jurisdiction of the subject matter was withdrawn by Section 2 of the Portal Act, and that defendant was entitled to a judgment dismissing the actions for such lack of jurisdiction. It was accordingly ordered that appellants' motion for summary judgment be denied, that appellee's be granted, and that a judgment be submitted dismissing the actions for lack of jurisdiction of the subject matter (G. R. 331–333, D. R. 103–105).

QUESTIONS PRESENTED

This brief is addressed to the following questions only:

1. Whether the court below erred in dismissing these actions by summary judgment without a trial on the ground that the activities for which recovery was sought were not "compensable" within the jurisdictional requirements of Section 2 of the Portal Act.

2. Whether the summary dismissal of these actions can be sustained on any of the other grounds urged by appellee.

SUMMARY OF ARGUMENT

1. The summary dismissal on jurisdictional grounds was error in view of the well-established rule that actions should not be dismissed prior to trial if, on any possible view of the pleadings and supporting documents, a plaintiff can establish his case, or if any material fact is in dispute. Appellants' complaints and affidavits expressly allege that the activities in question are "compensable" by contract and make a sufficient showing of compensability to satisfy the jurisdictional requirements of Section 2 of the Portal Act. While appellee's affidavits deny that the activities are compensable, the record before the district court actually shows that even on the basis of appellee's presentation of the facts, the activities in question were compensable to some extent and therefore sufficient to meet the jurisdictional requirements of the Portal Act. The

present state of the record on the issue of compensability is at the very least sufficiently doubtful to preclude summary dismissal and to require full development of the factual evidence.

2. The summary dismissal cannot be sustained on any other grounds advanced by appellee in view of the numerous varied and complex factual and legal issues and because of the sharp conflict in the factual evidence as set forth in the opposing affidavits. The burden is on appellee to establish that no conflict exists as to material facts, and it has not sustained that burden.

ARGUMENT

I

The summary dismissal on jurisdictional grounds was error

Under this Court's decisions in *Tipton* v. *Bearl Sprott Co.*, 175 F. (2d) 432 (C. A. 9) and *Joshua Hendy Corporation* v. *Mills*, 169 F. (2d) 898 (C. A. 9), it is clear that the allegations of the complaints sufficiently meet the jurisdictional requirements of Section 2 of the Portal Act. The question presented by this appeal is whether there was a sufficient showing apart from the pleadings (i. e., in the affidavits and stipulations) to warrant the conclusion, without a full trial of the factual issues, that the activities in issue were not "compensable" and that therefore the court was without jurisdiction. We submit that the affidavits and pleadings require quite the contrary conclusion and demonstrate at least the necessity of a full trial before final determination of the jurisdictional issue in these cases.

Appellants' complaints and affidavits allege an express agreement to pay overtime compensation for "hours worked" in excess of 40 in a workweek. Paragraph IV of Count I of each of the amended complaints alleges:

> That plaintiffs at all times mentioned in this action were employed by defendant under an express provision of an oral and written agreement in effect during all of the time of their employment; that pursuant to said agreement, plaintiffs were employed at a stipulated monthly salary based on 40 hours of work each week

> and were to receive in addition thereto additional compensation at one and one-half times their regular hourly rate for all hours worked in excess of forty hours in each workweek. That plaintiffs worked in excess of forty hours in each workweek during the period covered by this action, but did not receive the compensation required by the Acts, *although all of said work time and overtime was compensable under said agreement and said Acts.* [Emphasis supplied; D. R. 39, G. R. 107–108.]

In addition, an affidavit signed by eleven of the plaintiffs states:

> * * * throughout the period covered by this action, it was agreed that the plaintiffs would perform all of their aforesaid duties and would be paid a stipulated monthly salary, and that in addition, plaintiffs would receive time and a half their hourly rate bases (sic) upon a forty-hour week for all hours worked in excess of 40 in any workweek. [G. R. 119.]

It is clear from the preceding portions of the affidavit, which describe all of plaintiffs' duties in detail, that the term "aforesaid duties" includes the activities for which compensation is sought. (G. R. 113–118.)

There are, therefore, in the instant cases the necessary allegations that the activities were compensable. Cf. *Tipton* v. *Bearl Sprott Co.*, 175 F. (2d) 432 at 436. It follows that if the allegations set out in the verified complaints and in the affidavits are accepted as true, the jurisdictional requirements of Section 2 of the Portal Act have clearly been satisfied. This Court's remarks in a comparable situation are equally applicable here: "If and when this case goes to trial, appellants will, of course, have the burden of proving [their allegations] * * *. They may sustain this burden. They may fail to sustain it, *but we cannot assume that they will fail.*" [Emphasis supplied; *Tipton* v. *Bearl Sprott Co.*, 175 F. (2d) 432 at 435.]

That the allegations in appellants' pleadings and affidavits do provide a sufficient basis for proof of the right to recover is clearly indicated by this Court's decision in *Joshua Hendy*

Corporation v. *Mills, supra.* In that case, as appears to be the situation in the instant cases, the contract did not mention which types of activity would be compensable, but simply provided that overtime compensation would be paid for "work performed" in excess of 40 hours per week. This Court held that this provision sufficed to render the Portal Act inoperative to services rendered by an engineer during his lunch period, saying:

> It is paragraph 4 of the contract which renders the Portal-to-Portal Act inoperative. That paragraph, it will be noted, establishes the workweek at 40 hours straight time and 8 hours overtime and further provides for the payment of overtime for all "work performed" in excess of 40 hours per week. Mills performed 11 hours work in excess of 40 hours within the meaning of the phrase "work performed." He was paid for 8 hours overtime only.

The *Hendy* case was followed by the Court of Appeals for the Seventh Circuit in *Frank* v. *Wilson & Co., Inc.*, 172 F. (2d) 712, certiorari denied 337 U. S. 918, which also involved a quite similar situation. In the *Wilson* case, as in the *Hendy* case, and in these cases, the dispute arose out of the employer's failure to compensate the employees for time spent in certain activities engaged in outside any scheduled hours. As in the instant cases, and in the *Hendy* case, the contract did not mention which types of activity would be compensable. In the *Wilson* case, it merely provided overtime compensation for employees who "are required to work" in excess of the stipulated number of hours. Relying on, and quoting the above paragraph of, this Court's opinion in the *Hendy* case, the Seventh Circuit held that the jurisdictional requirements of Section 2 of the Portal Act had been met.

While the answers in the instant cases deny the above-quoted paragraphs from plaintiffs' complaints (D. R. 49, G. R. 137) and appellee filed affidavits in support of their denial (G. R. 197, 201), the net effect of the opposing affidavits is to indicate that the activities in issue are "compensable" even on the basis of the allegations and contentions of appellee—quite contrary

to the conclusion reached by the court below. Appellee's answers allege that appellants received a monthly salary as "the full and only compensation for all services," except emergency work at night which was paid for at a premium. Similarly, in the pretrial stipulation (G. R. 80) appellee claimed that "the monthly salary paid to plaintiffs covered all services performed, active or inactive, whether denominated waiting or stand-by time, or otherwise, except emergency call-outs during nighttime hours for which overtime was paid." Appellee has consistently maintained this position (G. R. 378). The answers and the pretrial stipulation also state that normal active services required only about two to five hours a day (G. R. 80, 140).

The fact that such a monthly salary was paid for all services, whether active or inactive, does not, of course, establish the type of activities which are ultimately to be counted as hours worked, nor does it establish how many hours were spent in a particular activity in a given week. Those remain disputed legal and factual questions which, for the reasons indicated *infra,* can best be determined by a full trial on the merits. It does, however, clearly establish, as far as the record which was before the district court is concerned, that appellants in fact received a monthly salary which was paid as compensation for any and all services, including the activities in issue here. The answers and pretrial stipulation show that some part of the salary was paid for inactive services. There can be little doubt that a flat salary for a week or a month constitutes compensation at straight time for all services during the period for which it is paid. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. Whether it is paid by reason of contract, or by custom or practice, is not particularly important. If it is paid by custom or practice, it clearly constitutes compensation at straight time for all of the services which it covers. If it is paid by contract, it satisfies the requirement in Section 2 of the Portal Act for an express provision of a contract as long as it is paid for the activities in question. *Joshua Hendy Corporation* v. *Mills,* 169 F. (2d) 898 (C. A. 9); *Johnson* v. *Dierks Lumber & Coal Co.,* 130 F. (2d) 115 (C. A. 8); *Frank* v. *Wilson & Co., Inc.,* 172 F. (2d)

712 (C. A. 7), certiorari denied 337 U. S. 918; *Lewellen* v. *Hardy-Burlingham Min. Co.*, 73 F. Supp. 63 (E. D. Ky).

The fact that the salary is intended to compensate only at straight-time rates, even if the services are performed during overtime hours, is of no significance as far as the jurisdictional requirements of Section 2 of the Portal Act are concerned. Section 2 of the Portal Act requires only that the activities be "compensable"—it contains no requirement concerning the rate at which they must be compensable. Thus, in *Michigan Window Cleaning Co.* v. *Martino*, 173 F. (2d) 466 (C. A. 6), the requirements of Section 2 of the Portal Act were held to be satisfied where an express contract made the activities compensable "and this, without regard to whether compensability was based on straight time or overtime." Similarly, in *Green* v. *Cherokee Motor Coach Co.*, 8 W. H. Cases 277, 280 (E. D. Tenn., not officially reported) the court said concerning Section 2, "It is not a question of whether there was a contract or custom to pay overtime. The question is whether there was a contract or custom to pay the employee for activities performed." This view was made clear by the President in his message to the Congress approving the Portal Act (93 Cong. Rec. 5281). He stated that Section 2 referred to "activities which were compensable in any amount." The Administrator has also consistently adhered to the position that it is sufficient in this connection that the activities be "compensable in any amount." [3]

Thus, the record in its present state, even on the facts as presented by appellee, appears to support the conclusion that the activities in issue are "compensable" within the requirements of Section 2 of the Portal Act. The most that can be said of appellee's pleadings and affidavits is that they create a sharp conflict over the most material jurisdictional facts. It is too well settled to need extended discussion of authority that where there is such conflict over material facts, it is clearly error to grant a motion for summary judgment.

Particularly is summary dismissal error where, as here, the disputed factual issues are not "clear cut and simple," but are

[3] General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938. Title 29, Chapter V, Code of Federal Regulations, Part 790, Section 790.9 (b). 12 F. R. 7655, 7660.

complicated mixed questions of law and fact. These are precisely the sort of cases to which the language in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, quoted at pages 15 and 16 of appellants' brief, is peculiarly appropriate. The mass of answers to interrogatories, opposing affidavits, and partial testimony presents a particularly "treacherous record" (334 U. S. at 257) for decision by the use of summary procedures. The Supreme Court in the *Silas Mason* case emphasized the fact that there was a substantial controversy as to how the parties construed their contracts in actual practice "both sides of the controversy being based on events of which we are asked to take judicial notice or to spell out from contracts without the tests which trial affords"—a situation which also exists with respect to the jurisdictional issue in the instant cases.

This Court in several decisions has taken occasion to point out the right of the parties to a full trial where material factual allegations are denied. In *Aaron Ferer & Sons* v. *Richfield Oil Corporation,* 150 F. (2d) 12 (C. A. 9), where the facts were presented by affidavits and counter affidavits, just as was done to a great extent in the instant cases, this Court held that a motion for summary judgment was properly denied, saying (at page 13): "This created a 'genuine issue as to a material fact' and hence required the usual trial by witnesses, subject to cross-examination * * *." See also *Lane Bryant, Inc.,* v. *Maternity Lane,* 173 F. (2d) 559 (C. A. 9).

Other appellate courts have consistently taken the same view, emphasizing the "great care" that should be taken in granting summary judgment where there is doubt as to the facts. Thus, in *Doehler Metal Furniture Co.* v. *United States,* 149 F. (2d) 130 (C. A. 2), the court said at page 135:

> We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts * * *. Denial of a trial on disputed facts is worse than delay. * * * The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered.

Similarly, in *Walling* v. *Reid,* 139 F. (2d) 323 (C. A. 8), in an action under the Fair Labor Standards Act, the court pointed out that mixed questions of law and fact should not be decided on "anything less than a full and careful inquiry into all the facts and circumstances," and pointed out the need for cross-examination of witnesses to bring out the true facts. See also *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U. S. 620, 627. The special need for a full trial of the complex issues presented in Fair Labor Standards Act cases has been noted not only by the Supreme Court (see *Silas Mason* case, *supra*), but has been repeatedly emphasized in decisions of the Court of Appeals for the Eighth Circuit in reversing judgments reached on summary procedure. See in addition to *Walling* v. *Reid, supra, Walling* v. *Fairmont Creamery Co.,* 139 F. (2d) 318, 323; *Musteen* v. *Johnson,* 133 F. (2d) 106, 108; *Stratton* v. *Farmers Produce Co.,* 134 F. (2d) 825, 827; and *McComb* v. *Johnson,* 174 F. (2d) 833.

There is an additional reason which makes summary dismissal of the jurisdictional question particularly inappropriate here. It is evident that the question of whether or not activities are compensable by contract, custom, or practice, so as to give the courts jurisdiction within the meaning of Section 2 of the Portal Act is inextricably interwoven with the many factual questions involved in determining what the contract, practice, or custom actually is, such as the understanding of the parties, the hours actually spent in the various activities, and whether or not those activities may, in whole or in part, be considered hours worked under all the existing circumstances. These are the very points on which the affidavits and counter affidavits are in sharpest conflict. It seems especially appropriate under such circumstances to let determination of the jurisdictional question await a full trial on the merits, since it is only by establishing a right to recover on the merits that the jurisdictional issue itself can be determined. See the quotation at page 16 of appellants' brief from *Twigg* v. *Yale & Towne Mfg. Co.,* 7 F. R. D. 488 (S. D. N. Y.), which fully supports this position. So, too, in *Land* v. *Dollar,* 330 U. S. 731, the Court said at page 735: "* * * this is the type of case

where the question of jurisdiction is dependent on decision of the merits."

II

The summary judgment of dismissal cannot be sustained on any of the other grounds advanced by appellees

The other issues briefed by the parties (namely, whether the activities for which recovery is sought constitute worktime under the Fair Labor Standards Act, and whether appellee has a complete defense under Section 9 or a partial defense under Section 11 of the Portal Act), were not resolved by the court below. Nor, we submit, can the summary judgment be supported by attempting to resolve them on this appeal. In view of the conflicting factual representations on these issues and in view of their complex character and importance, the decisions and principles discussed above under Point I apply with equal force to preclude their determination by summary procedures.

Even a most cursory examination of the affidavits, counter affidavits, and other documents in the record in the instant cases will disclose sharp conflicts on the facts material to the determination of these issues, such as the understanding of appellants as to employment contracts, the type of activity included in hours worked, and the time spent in such activities. These issues are anything but "clear and simple," and the mass of conflicting pleadings and affidavits obviously does not lend itself to summary disposition, particularly not on appeal. See discussion of *Silas Mason* case, *supra*. Appellants point out in detail many of the factual conflicts, at pages 13–14 of their brief. Appellee certainly has not sustained its burden of showing the contrary to be true.

It is clear that on a motion for summary judgment the burden is on the moving party to show that there is no disputed issue of fact. Thus, in *Walling* v. *Fairmont Creamery Co.*, 139 F. (2d) 318 (C. A. 8), the court said at page 322: "On a motion for summary judgment the burden of establishing the nonexistence of any genuine issue of fact is upon the moving party, all doubts are resolved against him * * *." The court also stated that on appeal the court "must give the plaintiff the

benefit of every doubt." To the same effect see *Wittlin* v. *Giacalone*, 154 F. (2d) 20 (App. D. C.); *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. (2d) 1016 (C. A. 8).

CONCLUSION

The summary judgments of the district court dismissing the complaints for lack of jurisdiction should be reversed and the cases remanded to the district court for trial.

Respectfully submitted.

WILLIAM S. TYSON,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
WILLIAM A. LOWE,
HARRY A. TUELL,
Attorneys,
United States Department of Labor, Washington, D. C.
KENNETH C. ROBERTSON,
Regional Attorney.

SEPTEMBER 1949.

APPENDIX

Section 2 of the Portal Act reads:

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there

shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, or any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

U. S. GOVERNMENT PRINTING OFFICE: 1949